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Muni Bonds and the Commerce Clause After *United Haulers*

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This report considers the constitutionality of the common state practice of exempting interest on the state's own municipal bonds from taxation but imposing tax on municipal bonds issued in other states. The authors weigh the effect of a recent Supreme Court decision, *United Haulers*, on challenges to those statutes, including one suit, *Davis v. Kentucky*, in which a petition for certiorari was recently granted. The authors say the Court held that a municipal ordinance didn't violate the dormant commerce clause because the ordinance operated as a preference for a government-owned facility. *United Haulers* might save from constitutional invalidity state tax laws favoring in-state municipal bonds, but the authors doubt it. Although

United Haulers lifts the presumption of unconstitutionality from laws favoring state-run businesses in competition with private business, the authors argue that the Court should remain skeptical of discriminatory laws that shield state officials from the pressure of competition with activities undertaken by other states. They predict that, if constitutional law remains as it stands, state laws exempting only in-state municipal bonds will be found to violate the dormant commerce clause. But they conclude that if they are wrong and state tax laws favoring in-state municipal bonds are shielded by *United Haulers*, it will mark a significant extension of the nascent state-run business exception to the dormant commerce clause.

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I. Introduction

Do states violate the dormant commerce clause when they exempt from tax their own bonds but not bonds from other states? The Supreme Court will resolve that question next term in *Davis v. Kentucky*.¹ The Court granted certiorari to review a decision of the Kentucky Court of Appeals, which held unconstitutional the portion of the Kentucky income tax code that grants an exclusion for in-state, but not out-of-state, municipal

bond interest.² The Kentucky decision conflicts with *Sharper v. Tracy*, a decision by the Ohio intermediate appeals court that discriminatory taxation of out-of-state municipal bonds was constitutionally permissible.³

To see how a typical state income tax exclusion for municipal bond⁴ interest works, consider the Kentucky statute at issue in *Davis*. Like most state income tax laws, the Kentucky income tax is conformed to the federal income tax. The starting point for computing Kentucky taxable income is "gross income" as defined by section 61. Section 104 excludes from income interest earned on municipal bonds. When computing Kentucky taxable income, Kentucky residents are required to add back to their federal gross income revenue earned on municipal bonds *not* issued by the state of Kentucky or one of its political subdivisions.⁵ The Kentucky and North Carolina

¹197 S.W. 3d 557 (Ky. App. 2006), cert. granted, May 21, 2007 (No. 06-666), Doc 2007-1719, 2007 TNT 17-13.

²The Kentucky Supreme Court denied discretionary review.

³*Sharper v. Tracy*, 647 N.E.2d 550 (Ohio Ct. App. 1994).

⁴We use the term "municipal bond" to denote all bonds eligible for preferential treatment by federal or state tax laws, whether issued by states or their political subdivisions.

⁵Ky. Rev. Stat. Ann. section 141.010(10)(c).

laws currently being challenged and the Ohio law validated by the *Sharper* court are essentially the same.

Those three states are not alone. In all, 43 states have tax laws that discriminate against out-of-state bonds.⁶ Of those, 38 states impose income tax on interest earned on out-of-state municipal bonds, while exempting from tax interest earned on all in-state municipal bonds. Four more states have tax laws that exempt interest on some (not all) in-state bonds but impose tax on all out-of-state municipal bonds. Of the remaining eight states, six don't impose an income tax (so the issue doesn't arise). The last two states are Utah and Indiana. Utah has a discriminatory law like Kentucky's, but the discriminatory treatment of out-of-state bonds does not apply for bonds issued by states that don't tax interest on Utah bonds.⁷ Indiana has the only nondiscriminatory tax rule in the nation: It exempts all interest on bonds issued by states and their political subdivisions.

The municipal bond market is huge. Between 1996 and 2002, state and local governments issued approximately \$2.1 trillion of tax-exempt bonds.⁸ Interstate investment in the municipal bond market is profoundly affected by the discriminatory tax provisions restricting state income tax exclusions to in-state bonds. According to the municipal bond research firm Municipal Market Advisors, at the end of 2005, 13 percent of all outstanding municipal bonds were held by state-specific mutual funds.⁹ All of the mutual fund companies caution that state-specific municipal bond funds are appropriate only for residents of that state¹⁰ because out-of-state buyers would not benefit from the state tax exemption and would squander the benefits of diversification. Morningstar, the mutual fund investment advisory, offers its readers the following advice:

Know Your State's Tax Rate. Some municipal-bond funds invest all over the country, while others focus on a single state. National funds offer geographical diversification and can seize opportunities from New York to New Mexico. Single-state funds, meanwhile, provide residents with income that's exempt from both federal and state taxes. (National muni funds give you only the federal tax break.) A Californian doesn't pay the 9.3% state income tax on the income from a California muni fund, and a resident of the Bay State avoids the 5.95% Massa-

chusetts tax on income from a Massachusetts fund. Choose a single-state fund if you live in a high-tax state. Otherwise, go national for the diversification benefits.¹¹

There is no doubt that investors who buy individual offerings of municipal bonds, rather than bond funds, are influenced greatly by the in-state-only interest tax exemption. The Bond Market Association, for instance, has compiled on its Web site the state income tax brackets for the 43 states that have discriminatory income tax exemptions,¹² to make it easy for investors to consider state income tax consequences when considering a municipal bond investment.¹³

Predicting how the Court will resolve this issue is complicated, more so now in the wake of the Court's recent decision in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*.¹⁴ In *United Haulers* the Court held that a municipal trash flow control ordinance didn't violate the dormant commerce clause because, although it granted a monopoly to a local trash processing facility to the exclusion of private trash processing facilities in other states, the ordinance wasn't "discriminatory." The Court found that the private trash processing facilities with which the Oneida-Herkimer municipal trash facility would compete absent the challenged law weren't "similarly situated."¹⁵ In particular, the Court held, publicly owned facilities are not similarly situated with those that are privately held.

One could read *United Haulers* to establish a new exception to the dormant commerce clause whereby states and their political subdivisions are permitted to favor in-state economic interests over out-of-state rivals *as long as* the state or municipal government owned some commercial operation in that market. The new exception is potentially broader than the existing "market participation" exception¹⁶ in that it shields regulatory rather than just participatory market incursions; and it could shield states from claims like the one in *Davis*.

We argue below, however, that *United Haulers* doesn't necessarily determine the outcome of *Davis*. If the Court rules in Kentucky's favor in reliance on the principle laid down in *United Haulers*, it will be a significant extension of what we term the nascent "state-run business" exception to the dormant commerce clause propagated by *United Haulers*.

We proceed as follows. After reviewing the nondiscrimination principle embodied in recent Supreme Court opinions applicable to state income tax laws, we address possible defenses that might vindicate state laws like the

⁶In a related context, Prof. Walter Hellerstein has remarked on his "instinctive sense" that any practice so widespread "cannot really be unconstitutional." Jerome R. Hellerstein and Walter Hellerstein, *State Taxation*, par. 4.13[2][b][v], at 4-88 (3d ed. 2000) (commenting on tax credits and business subsidies favoring private businesses).

⁷See Petition for Cert. 7-8, *Kentucky v. Davis*, No. 06-666, filed Nov. 9, 2006.

⁸See Cynthia Belmonte, "Tax-Exempt Bonds, 1996-2002," at 151 (*SOI Bulletin Summer 2005*), available at <http://www.irs.gov/pub/irs-soi/02govbnd.pdf>.

⁹Municipal Market Advisors, "Weekly Outlook," Oct. 23, 2006, available at <http://www.mma-research.com/mma/nonmembers/Outlook/MMAOutlook.pdf>.

¹⁰See, e.g., <https://flagship.vanguard.com/VGApp/hnw/FundsByObjectiveDetail?category=TEBondLT>.

¹¹See Morningstar, "Choosing a Municipal Bond Fund," available at <http://news.morningstar.com/classroom2/printless.asp?docId=3062&CN=COM>.

¹²See <http://www.investinginbonds.com/learnmore.asp?catid=8&subcatid=61>.

¹³See <http://www.investinginbonds.com/learnmore.asp?catid=8&subcatid=60>.

¹⁴550 U.S. ____ (2007) (Slip Op. Apr. 30, 2007) (No. 05-1345).

¹⁵*Id.* at 11 (quoting *General Motors v. Tracy*, 519 U.S. 278, 313 (1997), *Doc 97-4863*, 97 TNT 33-16 (Scalia, J. concurring)).

¹⁶We describe the market participant exception in more detail below. See *infra* notes 32-34.

one at issue in *Davis*. We consider but ultimately reject the idea that the market participation doctrine could save discriminatory state tax laws from invalidity, and then assess the importance of *United Haulers*. We think *United Haulers* makes the question whether the Supreme Court will validate preference for in-state municipal bonds closer and more difficult than it was previously, but ultimately conclude that the taxpayer should prevail in *Davis*. Along the way we situate *United Haulers* in the constellation of Supreme Court dormant commerce clause cases, and offer predictions and suggestions regarding the appropriate scope of the nascent state-run business exception to the dormant commerce clause.

II. The Nondiscrimination Principle

A basic rule that springs from contemporary Supreme Court cases is that a state tax rule discriminating in favor of in-state activities is presumptively unconstitutional.¹⁷ A rule is discriminatory if a taxpayer's effective tax rate increases when the taxpayer conducts economic activity out of state compared with what the effective tax rate would have been had the taxpayer engaged in the same activity in-state.¹⁸

The Court has applied that rule with a fair degree of consistency; constitutionality has generally not turned on the specific tax mechanism that creates the bias against interstate commerce. Exclusions, credits, deductions, and special modifications to the rate of tax have all been found unconstitutional.¹⁹ Indeed, since its landmark *Complete Auto* decision in 1977, the Court has never upheld a tax it deemed to be discriminatory.

The first case in this line is *Boston Stock Exchange* (1977), in which the Court invalidated a New York state stock transfer tax.²⁰ The stock transfer tax applied when any one of five events occurred in New York, including sale or transfer. The challenged provisions of the tax afforded a 50 percent reduction in the tax rate when a sale by a nonresident took place in New York and limited to \$350 the total tax liability (for both residents and nonresidents) for sales that took place in New York.

¹⁷*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

¹⁸A tax fitting that description might be constitutional if, for example, the measure is found to impose a compensatory burden, the effect of which is to make interstate commerce bear a burden borne by intrastate commerce (a use tax being the classic example), *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), or if the in-state and out-of-state activities being compared are found not to be comparable. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

¹⁹However, there are some state tax arrangements, most notably those relating to the division, or "apportionment," of income from a multistate entity, that in effect permit discrimination but for complicated reasons have escaped any real scrutiny. See *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978); Hellerstein and Hellerstein, *supra* note 6, par. 8.13[2][a], at 8-225 to 8-226, par. 8.13[2][b], at 8-229 to 8-235.

²⁰429 U.S. 318 (1977). Of course there are much older cases invalidating discriminatory taxes, but given the convoluted history of Supreme Court dormant commerce clause tax cases, it makes sense to begin in the year the Court handed down *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), when the modern era began.

Thus if a sale by a non-New Yorker took place on the Boston Stock Exchange but the shares were transferred in New York, the tax rate would be twice what it would have been had the sale taken place on the New York Stock Exchange (NYSE); or, if the sale in Boston attracted a New York transfer tax of more than \$350, regardless of the residency of the seller, the \$350 cap wouldn't apply like it would have if the sale had taken place on the NYSE. The Court observed that therefore:

the choice of exchange by all non-residents and by residents engaging in large transaction is not made solely on the basis of nontax criteria. . . . The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of regional exchanges. [The tax] forecloses tax neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States.²¹

The Court held that it is constitutionally impermissible *either* to encourage nonresidents to engage in commerce with the state *or* to discourage residents to engage in commerce outside of the state.

The next case was *Bacchus Imports, Ltd. v. Diaz* (1984), in which the Court invalidated a Hawaii excise tax imposed on liquors at wholesale on the ground that the tax included an exemption for *okolehao* — a brandy distilled from the root of an indigenous Hawaiian shrub — and pineapple wine.²² The Supreme Court, following the Supreme Court of Hawaii, found that the Legislature's motivation for exempting the local products from the tax was to promote local industry. Citing *Boston Stock Exchange*, the Court explained that it is impermissible to "tax interstate transactions in order to favor local businesses over out-of-state businesses" because "the Commerce Clause limits the manner in which States may legitimately compete for interstate trade."²³

In *New Energy Co. v. Limbach* (1988), a unanimous Court invalidated an Ohio motor vehicle fuel tax that offered a credit to fuel dealers who sold fuel that contained ethanol produced in Ohio, but no similar credit for fuel that contained ethanol produced in other states (unless the state in which the fuel was produced offered a credit for ethanol produced in Ohio).²⁴ The result in *New Energy Co.* seems in hindsight to have been utterly predictable, particularly after *Boston Stock Exchange* and *Bacchus*.

In *Fulton Corp. v. Faulkner* (1996), the Court invalidated a North Carolina intangibles tax that allowed resident

²¹429 U.S. at 331.

²²468 U.S. 263 (1984).

²³*Id.* at 272. *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), decided the same year as *Bacchus*, invalidated a New York franchise tax credit scheme that provided a bigger credit the more export shipping activity was conducted in New York. The Court found it irrelevant that the law operated by disallowing an otherwise allowable credit rather than by imposing a higher tax, because the practical effect of both would be the same: increasing the effective tax rate when the taxpayer does more business out-of-state.

²⁴486 U.S. 269 (1988).

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shareholders a credit equal to the fraction of the issuing corporation's income subject to North Carolina's corporate income tax.²⁵ If the issuing corporation did all of its business in North Carolina (so all of its income was subject to the North Carolina corporate income tax), the credit would eliminate the intangibles tax completely; if the issuing corporation did no business in North Carolina (so none of its income was subject to the North Carolina corporate income tax), no credit would be available; and in intermediate cases in which the corporation did some business inside and some outside of North Carolina, North Carolina shareholders would get a partial credit.²⁶ The effect of the tax was to increase the rate of tax in proportion to the fraction of business conducted out of state. Thus, like the tax at issue in *Boston Stock Exchange*, the tax foreclosed tax-neutral decision-making: North Carolina residents would find their tax burdens reduced when they chose to invest in corporations with more significant North Carolina operations, and corporations with shareholders in North Carolina could reduce their shareholders' tax bills by increasing property owned, employees, or sales within North Carolina relative to the total in each category.

Most recently, in *Camps Newfound/Owatonna v. Town of Harrison* (1997), the Court invalidated a Maine municipal property tax that included an exemption for property owned by charitable institutions *provided* the charitable institution is operated principally for the benefit of residents.²⁷ Charities like the petitioner's summer camp that operated primarily for the benefit of nonresidents, were taxed in full.²⁸ The opinion reinforces the familiar free trade theme that permeates all of the discriminatory tax decisions and comfortably fits within the rule that when states increase a taxpayer's effective tax rate for participating in interstate rather than purely intrastate commerce — here admitting campers primarily from other states — the rule creating the bias favoring intrastate commerce is unconstitutional.

Under the standard set out by these cases, a state's differential treatment of in-state and out-of-state municipal bonds would plainly be unconstitutional. As in *Boston Stock Exchange* and *Fulton Corp.*, the differential tax "forecloses tax neutral decisions" by imposing additional state tax on municipal bonds issued outside of the state. Indeed, in many respects those statutes appear almost identical to the Ohio credit scheme invalidated in *New Energy*: The state offers a tax discount to purchasers who acquire items produced and purchased inside the state.

²⁵516 U.S. 325 (1996), *Doc* 96-5316, 96 TNT 37-22.

²⁶For example, if IBM did 5 percent of its business in North Carolina in a given year, the effect of the allowable 5 percent credit would be that a North Carolina shareholder would pay intangibles tax on 95 percent of the value of her shares.

²⁷520 U.S. 564 (1997), *Doc* 97-13802, 97 TNT 97-25.

²⁸Charities that operated for the principal benefit of nonresidents could still enjoy a partial exemption if they did not charge more than \$30 per year for their services, which was not true for the petitioner. *Id.* at 568 n.2.

III. Defenses for Discriminatory Regulation

Against that backdrop, the case favoring constitutionality for tax provisions favoring in-state municipal bonds appears thin. There are, however, at least two distinct arguments that states could advance to overcome the weight of *Boston Stock Exchange* and its progeny: (1) the market participation exception to the dormant commerce clause, and (2) an argument that discrimination favoring state-run operations (particularly those that can be classified as "traditional") is subject to far less-exacting constitutional scrutiny than discrimination favoring in-state business.

The first argument is weak. Until the Supreme Court announced its decision in *United Haulers*,²⁹ the second argument also seemed quite weak, based on the reasoning of the Court's opinion in *C&A Carbone, Inc. v. Town of Clarkstown*.³⁰ However, in the wake of *United Haulers*, initial reports suggest it now seems likely that Kentucky's statute, and other state tax laws favoring in-state municipal bonds, will survive constitutional attack.³¹

We first explain why the market participation doctrine won't shield state income tax preferences for in-state municipal bonds, and then assess the fledgling doctrine that regulation (possibly including tax laws) that favors state or local government is effectively exempted from the dormant commerce clause.

A. The Market Participation Doctrine

The Court has upheld blatant discrimination by states in favor of in-state businesses when the state buys printing services, sells cement, purchases abandoned vehicles, or hires workers.³² That rule, referred to as the market participation doctrine, is an exception to the normal rule of "virtual per se invalidity" for facially discriminatory regulation.³³ The rationale underlying the rule is that states, just like private merchants, should be free to choose their trading partners.³⁴

Note, however, that this exception extends only as far as the concept of a market "participant" can take it. By its

²⁹*Supra* note 14.

³⁰511 U.S. 383 (1994).

³¹*See, e.g.*, Andrew Ackerman and Peter Schroeder, "High Court to Hear Davis Case," *The Bond Buyer*, May 22, 2007, available at <http://www.bondbuyer.com/article.html?id=20070521Q82KJOW0&from=home> (citing views of bond industry legal experts).

³²*American Yearbook Co. v. Sakew*, 339 F. Supp. 719 (M.D. Fla. 1972), *affd. mem.*, 409 U.S. 904 (1973) (printing services); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (cement); *Hughes v. Alexandria Scrap Corp.*, 429 U.S. 794 (1976) ("hulks," that is, abandoned cars); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) (hiring workers).

³³*See* Hellerstein and Hellerstein, *supra* note 6, at para. 4.13[1][a], p. 4-71 and n.302 (collecting citations to cases using the "virtual per se rule" formulation).

³⁴*Reeves*, 447 U.S. at 439 and n.12 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)). Academics have argued that the doctrine is undertheorized and have offered a variety of rationales for the market participation doctrine. The most complete summary and critique is Dan T. Coenen, "Untangling the Market-Participant Exemption to the Dormant Commerce Clause," 88 *Mich. L. Rev.* 395 (1989).

logic, the market participation exception should permit states to discriminate only to the extent that they are acting as an “ordinary” participant in the market would or could.³⁵ That is, if a state is free to discriminate in the ways a private actor could, the state’s mere participation in the market would not necessarily license the state to further control or regulate the market. For instance, purchasers (aside from monopsonists) don’t set prices. Therefore, a state’s decision to acquire, say, cement, would not also empower it to regulate cement prices in a way that contravened the dormant commerce clause. Thus, the inherent difficulty with that rule is determining when the state is acting as market participant and when it is acting as regulator.³⁶

In *Davis*, the state’s argument would be that it is acting as financier, much as private businesses do whenever they sell bonds. But the tax laws exempting in-state but not out-of-state municipal bond interest are a feature of the Kentucky tax code, not a feature of the municipal bonds themselves. Other market participants, however defined, do not have the power to determine the taxable status of their rival’s bonds. The state has not merely entered the market, but also stacked the market in its own favor. Or, put another way, the state enters the debt market twice — once as a participant when it sells bonds and once as a regulator when it specifies the tax treatment of the bonds it has (and other states have) sold.

The state might also argue that those interventions in the market should be grouped together and that they denoted participation, rather than regulation. In support of that argument, a state might point out that it could have achieved an economically identical outcome by modifying the terms of its bonds so they paid higher interest to holders subject to income taxation in the issuing state than to other holders. That is, the state could frame its policy as a simple “market” choice to borrow on terms more generous to the lender when the lender pays state tax than otherwise. Because the substance of the state’s treatment of municipal bonds, taken as a whole, is the same as the state could have achieved through a purely participatory intervention in the market, none of its activities should be classified as “regulatory.”³⁷

That argument is foreclosed by precedent. In *New Energy*, the Court rejected an invitation to apply the market participant doctrine. As described above, the challenged law in *New Energy* was an Ohio state tax credit against state fuel sales tax for fuels that incorporated Ohio-produced ethanol. The court quickly brushed

aside the claim that Ohio was participating in the ethanol market as either a purchaser or a seller, finding it obvious that assessment and computation of taxes is a regulatory function.³⁸

In *Camps Newfound*, the town argued that through the challenged property tax exemption the town was purchasing the services of the charitable institutions that qualified for the exemption (recall that to qualify for the tax exemption, a specified share of the charity’s beneficiaries had to be state residents).³⁹ The Court acknowledged that many tax provisions are designed to function as subsidies to local industries, but concluded that that fact doesn’t transform the tax law into market participation; the Court explained that nothing short of *direct* state participation in the market would suffice.⁴⁰ The plurality opinion in *South Central Timber Dev. v. Wunnicke* is to the same effect, as described elsewhere.⁴¹

There are difficult cases in which classifying the government’s activity as market participation or regulation is ambiguous, but *Davis* isn’t one of them.⁴² Taxation is a “regulatory” function, not one performed by market participants. And although there might be economically equivalent transactions that would make the state a “direct” seller of higher-rate bonds to its taxpayers, the form states have chosen does not.⁴³ Thus, the Court couldn’t plausibly conclude that exemption for municipal bond interest was market participation instead of regulation without overruling or at least severely limiting *New Energy* and *Camps Newfound*.

B. The Nascent State-Run Businesses Exception

Until recently, then, the prospect that states could constitutionally exempt only their own bonds from taxation appeared quite dim.⁴⁴ The scene may have brightened considerably with the Supreme Court’s recent decision in *United Haulers*. *United Haulers* appears to

³⁸*Id.* at 277 (“assessment and computation of taxes [is] a primeval governmental activity”).

³⁹Respondent’s Brief at 34, *New Energy* (No. 87-654) (“The expenditures which exemptions for charities represent can be viewed as ‘purchases’ of services through a tax exemption.”).

⁴⁰520 U.S. at 593. Unfortunately, distinguishing direct from indirect market participation isn’t easy. Compare *South Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984) (applying market participation doctrine when the state imposed a requirement through contract on its counterparty in which the requirement was inherently regulatory), with *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) (refusing to apply the doctrine in the same circumstance).

⁴¹See Coenen, *supra* note 34, at 403.

⁴²For close cases, see *supra* note 40.

⁴³*Cf.* Christopher R. Drahozal, “On Tariffs v. Subsidies in Interstate Trade: A Legal and Economic Analysis,” 74 *Wash. U. L.Q.* 1127, 1141 (1996) (arguing that in the Court’s application of the market participant doctrine, “the economic effect of the state . . . program is not material to the analysis; instead, all that matter[s] [i]s the form”).

⁴⁴The potential constitutional infirmity of taxing out-of-state but not in-state municipal bonds could be corrected either by imposing state income tax on all municipal bonds or on none of them. If the Court rules for the taxpayer in *Davis*, we would expect different states to make different *prospective* policy decisions regarding how to proceed. Retrospectively, however, the

(Footnote continued on next page.)

³⁵See *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 157-158 (2d Cir. 2006).

³⁶An obvious point of contention, one not so far squarely confronted by the Court, is how one should define “participant.” See *infra* note 40.

³⁷This argument would be more tenuous for bonds not issued by the state itself but rather by municipalities or other state subdivisions. In those instances, the state could not plausibly claim that through its income tax law it was simply changing the terms on which it deals with its own lenders. However, favorable treatment for bonds issued by state subdivisions could still be envisioned as the equivalent of a cash subsidy.

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announce a rule providing that state regulations in favor of a government-run enterprise will be subject only to mild scrutiny. That suggests, in turn, that a state tax regime favoring bonds issued by state and local government need clear only a relatively low constitutional hurdle. As we will explain, however, we believe that ultimately *United Haulers* is distinguishable from the municipal bond case and therefore that it too will not provide shelter for differential taxation of in-state and out-of-state municipal bonds.

1. *United Haulers*. *United Haulers* continues a long tradition of Supreme Court dormant commerce clause trash cases. Most notable among those antecedents was the Court's 1994 decision in *Carbone*, which invalidated a local town ordinance granting a select local facility exclusive rights to collect, for a fee, all trash in the town.⁴⁵ In exchange, the putative owner of the facility granted the town an option to acquire the trash facility for \$1 after the facility had been in operation for five years. In effect, the town had built its own facility, with title nominally held by a private firm, and had financed it by granting monopoly profits to the private builder.⁴⁶ The Court struck down the ordinance, holding that it discriminated against interstate commerce and therefore was defensible only "under rigorous scrutiny."⁴⁷ The Court found that the town's ordinance failed that scrutiny because other financing alternatives were available.⁴⁸

United Haulers presented almost identical facts to *Carbone* but reached the opposite conclusion. As the Court noted, "the only salient difference is that the laws at issue [in *United Haulers*] require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation" — that is, a nominally public rather than private entity.⁴⁹ That difference proved significant. After noting that "discrimination assumes a comparison of substantially similar entities," the Court found that a public trash facility is not substantially similar to competing private trash facilities and that therefore the "rigorous scrutiny" of *Carbone* did not apply.⁵⁰ It then (in a section of the opinion garnering only four votes) upheld the trash flow ordinance under a less exacting balancing test.

The Court justified that result by pointing to the underlying purposes of the commerce clause. In particu-

lar, the Court claimed that public ownership of the privileged facility (present in *United Haulers*, but absent in *Carbone*, at least formally) was significant because the evidentiary inferences that flow from discrimination in favor of public entities differ from those that would arise in the case of discrimination in favor of private business. The latter, the Court claimed, justifies rigorous scrutiny because it often is the result of "simple economic protectionism," while discrimination in favor of government might result from many other purposes.⁵¹ When local government likely acts for reason other than simple protectionism, the balance between local autonomy and the need to protect free trade swings in favor of local autonomy. Thus, although laws favoring government business are in a literal sense discriminatory, they may not constitute "discrimination" in the Court's technical usage.⁵²

United Haulers has fairly obvious implications for *Davis* and other cases presenting the same issue. Like the ordinance granting the townships a monopoly in *United Haulers*, state tax laws imposing tax only on out-of-state municipal bonds are "laws favoring local government." They therefore should have to meet only the relatively forgiving balancing test for "legitimate local concerns with effects upon interstate commerce that are only incidental."⁵³ Importantly, however, Chief Justice Roberts was able to gather only three other votes for the proposition that revenue generation can be a proper purpose that might justify state regulation with incidental effects on commerce. *Carbone* held that "revenue generation is not a local interest that can justify discrimination against interstate commerce."⁵⁴ It is possible, therefore, that revenue raising will also be an invalid consideration in support of nondiscriminatory laws having an incidental effect on interstate commerce, such that states will have to point to some reason other than revenue for denying an exemption for out-of-state municipal bonds.⁵⁵

2. Distinguishing *Davis* from *United Haulers*. Despite the similarities, we think that in the end, *United Haulers* is distinguishable from the case of differential taxation of in-state and out-of-state municipal bonds. Most significantly, while both *Davis* and *United Haulers* involve "discrimination" (in the nontechnical sense) in favor of a local government project, the municipal bond scenario

states would be required to issue refunds to taxpayers holding out-of-state bonds. See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990); Walter Hellerstein and Dan T. Coenen, "Commerce Clause Restraints on State Business Development Incentives," 81 *Cornell L. Rev.* 789, 873 (1996) (noting that although the *McKesson* Court held open the possibility of retroactively repealing the favored treatment for those privileged by the invalidated tax provision, practical, political, and legal difficulties would make that course of action exceedingly unlikely).

⁴⁵*C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

⁴⁶*Id.* at 393.

⁴⁷*Id.* at 392.

⁴⁸*Id.* at 392-394.

⁴⁹*United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, No. 05-1345 (Apr. 30, 2007), slip op. at 1.

⁵⁰*Id.* at 10-13.

⁵¹*Id.* at 11.

⁵²We elaborate on the technical usage of the term "discrimination" below. See text accompanying notes 57-60 *infra*.

⁵³*United Haulers*, slip op. at 14.

⁵⁴*Carbone*, 511 U.S. at 393.

⁵⁵It is worth emphasizing that the policy that states will have to justify is not exemption for their own bonds, but rather the denial of exemption for municipal bonds originating in other states. For example, in *United Haulers*, the Court demanded justifications, not for the existence of the trash facility, but rather specifically for the challenged ordinance granting exclusive hauling rights to the public facility operators. Ultimately, the towns were able to link the two by arguing successfully that the trash facility likely could not succeed without the grant of the monopoly right. But we see no similar argument linking discrimination against out-of-state bonds to the need for tax-exempt bonds generally.

discriminates *against* a different set of actors. While the ordinance at issue in *United Haulers* discriminated against *all* trash haulers, whether local or out of state, the state municipal bond provisions discriminate *only* against out-of-state issuers of municipal bonds, which are themselves public entities. As a result, there is a stronger argument that the favored and disfavored groups are “similarly situated.” We explain the significance of that point momentarily. Perhaps more importantly, the absence of private in-state competitors issuing municipal bonds suggests that there are only minimal political checks on the state’s decision to distort the interstate market for capital.

a. The public-private distinction. The outcome of *United Haulers* turns on the “public” character of the project favored by the monopoly right challenged there. As we have explained, the Court relied on the fact that the trash facility was government-owned to draw an inference that the ordinance was not “simple economic protectionism.” Also, the fact that the facility was public played a role in the Court’s formal doctrinal analysis. Again, that was the only distinction of any substance between *United Haulers* and *Carbone*.⁵⁶ The Court was able to distinguish *Carbone*, without abrogating it outright, by claiming that “any notion of discrimination assumes a comparison of substantially similar entities.”⁵⁷ It then asserted, in essence, that public entities are not substantially similar to private entities and therefore that the ordinance at issue in *United Haulers* did not “discriminate.”

If we take that syllogism at face value, the taxation of municipal bonds would seem clearly distinguishable from *United Haulers*. State income tax provisions imposing tax on municipal bonds issued by government entities outside the taxing state benefit in-state municipal bond issuers at the cost, not of private entities, but rather

of other governments. Thus, those tax provisions treat differently two entities that are identical in all relevant respects except the state in which they are located. The state is interfering, not in public vs. private competition, but in public vs. public. As a formal matter, the taxes should therefore be evaluated under *Carbone*, not *United Haulers*.

One likely counter to that argument would be to posit that in fact in-state municipal bonds “compete,” in some sense, not only with out-of-state municipal bonds but also with private bonds. We would agree that the state tax exemption for in-state public bonds likely raises slightly the cost of borrowing for private issuers. Ultimately, however, all capital competes with all other capital,⁵⁸ so that if the concept of competition is to do any work at all, there must be a dividing line that separates constitutionally significant competition from all else. As a practical matter, we think the municipal bond market is sufficiently distinct from the taxable bond market that competition between municipal and taxable bonds is not constitutionally significant. For instance, the prevalence of single-state bond funds, in defiance of the general economic wisdom of diversification, illustrates the extent to which purchasers of municipal bonds do so solely as a result of their tax-exempt status.⁵⁹

Even if that reply is not fully persuasive, it would still remain the case that the municipal bond cases would not be squarely within the holding of *United Haulers*. At worst, the bond cases present a scenario in which the challenged laws benefit an in-state public entity at the expense of *both* private and public competitors. *United Haulers* does not tell us how to decide whether “discrimination” encompasses comparisons between entities, some but not all of whom are “substantially similar.”⁶⁰

One might also object that the public-private distinction was likely a purely rhetorical maneuver the Court took to sidestep *Carbone* without formally overruling it and that in the future *Carbone* will have no further weight. We agree that is certainly a possibility, especially because the municipality in *Carbone* for virtually all intents and purposes *was* the owner of the (formally privately owned) trash facility. We note, however, that Chief Justice Roberts was unable to get a fifth vote for the portion of his opinion, Part II.D., that arguably would have overruled a portion of *Carbone*. We also note that

⁵⁶Our readers, being tax experts, are no doubt aware of the considerable fluidity of formal “ownership.” As the holder of a \$1 option to purchase a facility that cost \$1.4 million to build, the municipality that issued the ordinance invalidated in *Carbone* was, in an economic sense, the owner of that facility (although the municipality might have been shielded from downside risk if the facility wound up to have a negative value on account of environmental liabilities or the like).

⁵⁷*United Haulers*, slip op. at 10 (quoting *Gen'l Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1998)). The result is not an obvious implication of *General Motors*. In *General Motors*, the Court found that a state tax credit for “natural gas companies” did not “discriminate,” despite the fact that only in-state utility companies currently qualified under that category. *General Motors*, 519 U.S. at 282-283, 298-304. The Court explained that the utilities did not, as an economic matter, compete for the same customers as the out-of-state natural gas providers. *Id.* at 300-302. It noted, however, that there was a “possibility” of competition, and suggested that if there had been any evidence of competition, it would have faced a rather different question. *Id.* at 302-303; see also *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 562, 582 n.16 (1998). In contrast, the *United Haulers* Court acknowledged that there was genuine economic competition for trash hauling services between the counties’ facility and other haulers. That was just the question seemingly left open by *General Motors*.

⁵⁸See Ferdinand P. Schoettle, “Big Bucks, Cloudy Thinking: Constitutional Challenges to State Taxes — Illumination from the GATT,” 19 *Va. Tax Rev.* 277, 353 (1999).

⁵⁹See text accompanying note 11 *supra*.

⁶⁰Similarly, although beyond our scope here, *United Haulers* does not consider the appropriate level of scrutiny for laws favoring both public and private in-state actors. If a state owns a single apple tree, can it enact laws favoring all domestic apple growers at the expense of all foreign orchards, and escape “rigorous” scrutiny? We suspect that whatever level of scrutiny the Court purported to apply in such a case, it would take a very skeptical view of the asserted in-state benefits. For now, however, our main point is that *United Haulers* leaves open those questions, rather than — as some initial reactions have suggested — resolving them.

Justice Ginsburg, without explanation, joined the majority in both *Carbone* and *United Haulers*. Because the Chief's *United Haulers* opinion recites many of the points urged by Justice Souter's *Carbone* dissent, we can only assume that Justice Ginsburg has either changed her mind or attaches some significance to the wholly formal factual difference between the two cases.

There are at least two good reasons to distinguish private-public competition from public-public competition. Both involve the relative weights courts should assign to the competing values of free trade and local government autonomy. In two key paragraphs at the heart of the majority opinion, the *United Haulers* court explains that "treating public and private entities the same . . . would lead to unprecedented and unbounded interference by the courts with state and local government."⁶¹ There are instances, however, when the interests underlying that respect for local government autonomy are weakened, and therefore when we think the need to preserve free trade might well swing to the fore. Our suggestion is that *United Haulers* and *Davis*-type cases implicate different underlying concerns.

First, we think state autonomy deserves little regard when the state exercises it to discriminate in favor of its own public entity at the expense of other, rival public entities. A major component of the respect for state autonomy in the Court's dormant commerce clause jurisprudence is the importance of the competition among states, and between states and the federal government, to attract capital, mobile citizenry, and political goodwill and allegiance.⁶² That interstate competition for good government replaces the market discipline that drives competition among private firms, therefore ensuring that local government will, like industry, strive to become ever more efficient and effective, enhancing overall national welfare.⁶³ If each state is free to shield itself from the consequences of poor performance, that discipline breaks down, undermining one of the key advantages that a federated government was supposed to offer over purely central authority.⁶⁴ For instance, in the context of general obligation bonds, discrimination against out-of-state bonds allows a state to shield itself against competitive pressure from jurisdictions whose better fiscal management has resulted in a superior bond rating.

Second, as we have explained, the *United Haulers* Court presumed that laws favoring local government are likely to serve "legitimate goals," rather than mere protectionism. In the case of laws affecting public-public competition, however, the inference that the law serves some public good, other than entrenching the enacting officials against outside competition, is rather weaker. Therefore, again, the values of free trade should assume a greater importance in the Court's balancing — leading either to "rigorous" scrutiny or perhaps a level of scrutiny somewhere between rigorous and what seemed to be the highly forgiving standard the *United Haulers* plurality applied in Part II.D of Chief Justice Roberts's opinion.

b. Where are the competitors? Another important difference between *United Haulers* and in-state municipal bond preferences is the identity of the competitors affected by the preference. After concluding that public and private trash haulers were not "substantially similar," the Court added that that "it bears mentioning that the most palpable harm imposed by the ordinances — more expensive trash removal — is likely to fall upon the very people who voted for the laws."⁶⁵ Those costs, it claimed, would result in "political restraints" on any unfair burdens on interstate competition.⁶⁶ Further, in a footnote, the Court responded to the possible danger of a future "Oneida-Herkimer Hamburger Stand" by observing that "the existence of major in-state interests adversely affected by a law is a powerful safeguard against legislative abuse."⁶⁷ Similar political considerations have at times played a deciding role in the Court's commerce clause jurisprudence, with *West Lynn Creamery v. Healy* a primary example.⁶⁸

The Court's assertion in *United Haulers* that the added costs of trash removal are the "most palpable" harm of the Oneida-Herkimer ordinance is dubious. The Oneida-Herkimer ordinance imposes at most a small, difficult-to-measure harm spread widely across the local political community. The difficulty of discerning that harm and the collective action problems inherent in mobilizing against it are formidable (particularly when compared with the concentrated harm done to out-of-state trash processors and their owners).⁶⁹

⁶¹*United Haulers*, slip op. at 11-12.

⁶²See Laurence H. Tribe, *American Constitutional Law*, section 6-11, at 434 (2d ed. 1988); Dan T. Coenen, "Business Subsidies and the Dormant Commerce Clause," 107 *Yale L.J.* 965, 1033-1034 (1998).

⁶³For the genesis of this theory, see Charles M. Tiebout, "A Pure Theory of Local Expenditures," 64 *J. Pol. Econ.* 416 (1956). Of course, this competition rationale is not without its critics. See, e.g., Richard Briffault, "Our Localism, Part II — Localism and Legal Theory," 90 *Colum. L. Rev.* 346, 349-352, 415 (1990) (arguing that there cannot be meaningful competition for good government when competitors have vastly unequal resources).

⁶⁴The Court has explicitly recognized intergovernmental competition as a value to be protected under the dormant commerce clause. See *Trinova Corp. v. Mich. Dep't of Treas.*, 498 U.S. 358, 374 (1991); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

⁶⁵Slip op. at 13.

⁶⁶*Id.* (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-778 n.2 (1945)).

⁶⁷*Id.* at 13 n.7.

⁶⁸512 U.S. 186 (1994), *Doc* 94-5761, 94 *TNT* 118-5; see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17; *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 447 (1978).

⁶⁹See Drahozal, *supra* note 43, at 1154-1155; Daniel Shavero, "An Economic and Political Look at Federalism in Taxation," 90 *Mich. L. Rev.* 895, 931-932 (1992); Mark Tushnet, "Rethinking the Dormant Commerce Clause," 1979 *Wis. L. Rev.* 125, 132-133. Theoretically, it would be quite rational for state residents to accept some burdens as the price of exporting other costs to other states. If the overall in-state pie is larger, those voters suffering an added burden should expect to come out ahead in the long run through logrolling. Thus, residents burdened by discriminatory regulation might not mobilize even when they could otherwise overcome the collective action problem discussed in the text. However, local actors are likely aware that the

(Footnote continued on next page.)

Contrast *West Lynn Creamery*, in which the Court struck down a Massachusetts scheme pairing a uniform milk tax with a subsidy for local milk providers. The result, the court observed, was an increase in the price of milk to the detriment of Massachusetts consumers. Yet the Court focused on the political effects of the scheme for milk dealers and dairy farmers, the groups who were likely to be most aware of the scheme and most politically active in supporting or opposing it.⁷⁰ The Court observed that “consumers would be unlikely to organize effectively to oppose the pricing order” because they were unlikely to notice any price increase, and even if they did, they wouldn’t attribute it to the challenged regulation.⁷¹ Unless there is some important structural difference between the markets for trash processing and milk, the analysis by the Court in *West Lynn Creamery* is difficult to square with the claim that Oneida and Herkimer voters were “most palpabl[y]” harmed by the flow control ordinance at issue in *United Haulers*.

To the extent politics informs dormant commerce clause doctrine, we think the *West Lynn Creamery* analysis is more convincing than the analysis in *United Haulers*. Nearly every nonneutral tax or regulation potentially harms consumers in the sense that it lowers the overall efficiency of the market. Thus, if harms to in-state consumers automatically ratcheted down the level of judicial scrutiny, the dormant commerce clause would be rendered toothless. Because this portion of the *United Haulers* opinion so sharply conflicts with the more conceptually sound analysis in *West Lynn Creamery* and other similar cases, we think its enduring significance will be minimal.

But even if we are wrong in our assessment of the significance of the portion of *United Haulers* focusing on harm to consumers, we still think it is distinguishable from the municipal bond scenario. In *United Haulers*, it was difficult to tell a true cost-exporting story. The monopoly diminished the efficiency of the interstate market for trash-processing. But, factoring in harms to local private processors, it isn’t clear whether the Oneida-Herkimer monopoly actually transferred wealth from outside those counties to inside the counties. It therefore

payoffs from logrolling may never come, either because the pie doesn’t grow as planned or because the political understanding by which the burdened in-staters are compensated doesn’t translate into political action as conceived. Therefore, in a more realistic picture of the political process, cost exporting may not prevent local interests burdened by a regulation or tax from opposing it, unless the payoff is very likely to arrive.

⁷⁰Similarly, Justice Sandra Day O’Connor, concurring in *Carbone*, observed that a local government monopoly imposes large, visible costs on local private would-be competitors and that it therefore is plausible that those local interests will be able to overcome their collective action problems. *Carbone*, 511 U.S. at 404-405 (O’Connor, J., concurring) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 675 (1981)). We think the point also explains the significance of the *United Haulers* Court’s reference to in-state interests as a check against the spectre of the “Oneida-Herkimer Hamburger Stand.”

⁷¹*West Lynn Creamery*, 512 U.S. at 201 and n.18.

was somewhat more likely that consumers in Oneida and Herkimer would object to what was in effect a user fee for trash removal.⁷² In contrast, the disparate taxation of municipal bonds straightforwardly enriches the taxing state at the expense of sister states, which, by definition, cannot be directly represented in the political process.⁷³ And, unlike the out-of-state trash haulers in *United Haulers*, who could rely on the efforts of local haulers, out-of-state municipal bond issuers have no concentrated, similarly burdened in-state constituency to make their case for them.

c. Other distinctions. Finally, we see two other possible differences between *United Haulers* and *Davis*, although we think those last two are less likely to be adopted by a court. First, *United Haulers* at points emphasizes the fact that trash hauling is a “traditional government function,” and it is not a certainty that one could say the same of bond financing.⁷⁴ Second, one might argue that *United Haulers* should be limited to “regulatory” cases and not applied at all to tax. But we find any distinction between tax and regulation fairly ephemeral.

The Court is not particularly clear on the role “tradition” plays in its analysis. It simply notes that it is “particularly hesitant to interfere” with typical and traditional government functions.⁷⁵ Perhaps that’s another way of saying either that roles the government has filled before are less likely to be employed as a vehicle for protectionism⁷⁶ or that the balance between free trade and local autonomy should tip slightly farther toward autonomy to carry out “traditional” government functions. The difficulty is that that factor, if given any real weight, would seemingly cut into the role of state and local governments as agents of innovation, experiment, and competition. And, of course, as the dissent notes, the Court has tried and failed before at defining “traditional” government activities.⁷⁷ Therefore, that point strikes us as a makeweight. At most, we think that it will likely go the

⁷²As we have noted, however, we remain skeptical that those objections could have translated to political success. See *supra* note 69.

⁷³We think the Court is likely to recognize the significance of this distinction. Justice David Souter’s dissent in *Carbone* emphasized the possibility of harms to consumers as a check on the town’s behavior. *Carbone v. Town of Clarkstown*, 511 U.S. 425-427 (1994) (Souter, J., dissenting). He acknowledged, however, that the argument would not be persuasive in the case of a cost-exporting regulation. *Id.* at 425-426 and n.15.

⁷⁴*United Haulers*, slip op. at 12-14 and n.7. We think that question would be much more difficult in the case of so-called section 529 plans. A section 529 plan is a tax-deferred investment vehicle for postsecondary education expenses, authorized under section 529, and managed by and offered through individual states. States generally grant deferral for funds invested in plans they manage, but not for funds invested in other states’ plans.

⁷⁵*United Haulers*, slip op. at 12.

⁷⁶*Cf. id.* at 13-14 n.7 (relying on the “customary and traditional” nature of trash hauling as a government function to distinguish it from other possible state-run commercial ventures).

⁷⁷*United Haulers*, slip op. at 14-15 (Alito, J., dissenting).

way of “public use” in takings doctrine; a “traditional” government purpose will be whatever the public has chosen fairly to do.⁷⁸

As for the tax-regulatory distinction, we note that while such a divide has a respectable doctrinal pedigree, it makes almost no functional sense. The Court has routinely distinguished between impermissible tax incentives and economically identical, but probably constitutionally permissible, direct subsidies.⁷⁹ Similarly, pre-eminent commentators have described the Court’s dormant commerce clause tax jurisprudence as largely separate and distinct from its evaluation of broader “regulatory” statutes.⁸⁰ Perhaps one might give some substance to this formal difference by suggesting that taxes are just about raising revenue and that therefore the inference of protectionism is much stronger in the case of discriminatory taxes.

While in theory it might therefore be argued that *United Haulers* does not affect the meaning of “discrimination” under the *Complete Auto Transit* test (the gold standard for commerce clause review of tax legislation), we think that distinction cannot endure. We agree with Prof. Edward Zelinsky that existing differences among review of taxes, subsidies, and regulations are incoherent and unstable.⁸¹ And we think the revenue-regulation dichotomy is illusory. Even putting aside taxes, such as sin taxes, whose explicit point is to change behavior, the very act of choosing a tax base involves decisions about how best to allocate the economic burden of the tax. Tax, in other words, is inherently redistributive. We doubt the Court would consider the choice of how best to allocate redistributive burdens as anything other than a central function of government to be protected carefully.

IV. Conclusion

United Haulers is an important decision, with many interesting implications for the law of the dormant commerce clause. On balance, however, we think *Davis* is distinguishable. The ordinance upheld in *United Haulers* was subject to powerful political checks from concentrated local constituencies with a strong motive to oppose the ordinance, checks simply not present when states discriminate against bonds issued by other states. And, while *United Haulers* lifts the presumption of unconstitutionality from laws favoring state-run businesses in competition with private business, it is doubtful that the Court would turn such a favorable eye on laws shielding state officials from the pressure of competition with rival state-run enterprises. Therefore, we predict that, if con-

stitutional law remains as it stands, state laws exempting only in-state tax-exempt bonds will be found to violate the dormant commerce clause.

⁷⁸See *Kelo v. City of New London*, 545 U.S. 469, 478-483 (2005).

⁷⁹See Hellerstein and Coenen, *supra* note 44, at 836-846.

⁸⁰Geoffrey R. Stone et al., *Constitutional Law*, 274 (5th ed. 2005).

⁸¹Edward A. Zelinsky, “Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation,” 29 *Ohio N.U.L. Rev.* 29, 30-32 (2002); Edward A. Zelinsky, “Are Tax ‘Benefits’ Constitutionally Equivalent to Direct Expenditures?” 112 *Harv. L. Rev.* 379, 417, 421 (1998). However, we draw rather different conclusions from that premise, as we hope to elaborate on at greater length elsewhere.